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Supreme Court, U.S.
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No. _____

in the

Supreme Court of the United States

BRUCE ROTH,
Petitioner

vs.

UNITED STATES OF AMERICA,
Respondent.

Petition for Writ of Certiorari
to the United States Court of Appeals
for the Seventh Circuit

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Questions Presented

Whether an acknowledged conflict of trial counsel that he could not represent Petitioner if he wanted to plea bargain or otherwise cooperate with the government because of other clients involved in the same activity can be perfunctorily waived without the trial court conducting a hearing to develop and balance the interests to be represented by counsel of choice with the judicial public policy for judicial proceedings to be conducted by conflict free counsel.

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in the

Supreme Court

of the

United States of America

October Term, 1988

BRUCE ROTH,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI
to the United States Court of Appeals
for the Seventh Circuit

Opinions Below

The decision of the United States Court of Appeals for the Seventh Circuit, Case Nos. 87-2611 and 88-1519, is set out in the Appendix [A - 1], *infra*, and is reported at 860 F.2d 1382. The denial of the motion for rehearing, and the changes to the final text stated therein, is set out in the Appendix [A - 17], infra, and is not yet reported.

Jurisdiction

The decision of the United States Court of Appeals for the Seventh Circuit was entered on October 26, 1988. The timely Petition for Rehearing was denied on December 6, 1988. This Petition for Certiorari was timely filed pursuant to Supreme Court Rules 20.1 and 28.2. Jurisdiction of this Court exists under 28 U.S.C. § 1254(1).

United States Constitutional Provisions

Amendment VI: In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed; which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence.

Statement of the Case

This is one of the federal Greylord cases involving corruption in the Chicago judicial system. The Petitioner, Bruce Roth, an attorney practicing in the Cook County Courts, was tried and convicted of violating the Hobbs Act, 18 U.S.C. § 1951, and the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961-68 by the United States District Court for the Northern District of Illinois, Eastern Division; he was sentenced to 10 years in prison.

A pretrial hearing was held concerning a conflict of interest by Roth's attorney. [A 19-32] Because the attorney represented other clients who were or might be involved in the Greylord cases, he had advised Roth that he would be unable to

represent him in the event Roth wished to cooperate with the government on a plea agreement. Roth expressly waived this conflict in reference to cooperation, and expressed his desire that the attorney continue to represent him. ~~After the trial, Roth was subpoenaed by the Grand Jury and his attorney advised Roth that he could not represent him because of a conflict of interest. He later withdrew as appellate counsel for the same reason. Roth filed a Motion for New Trial under F.R.C.P. 33 which was denied.~~

The trial judge did not explore the conflict issue beyond the perfunctory waiver, or otherwise seek to balance the right to counsel and the importance to the judicial system for representation by conflict free counsel. Trial counsel was allowed to represent Roth. Almost immediately after his conviction Roth was subpoenaed before the federal Grand Jury investigating a judge, another Greylord target, who was also a client of trial counsel. Roth's trial counsel advised Roth that because of this conflict Roth would have to obtain another attorney to represent him. After sentencing Roth obtained new counsel for the appeal and for a Rule 33 motion.

Petitioner discovered that his trial counsel had numerous conflicts of which he was previously unaware and which affected trial counsel's representation of petitioner. The facts are set forth in the affidavits submitted in conjunction with the Rule 33 Motion. The major claims related to conflicts between the trial counsel and Roth, and other clients of trial counsel, and conflicts which directly affected trial counsel's ability to represent Roth in a conflict-free manner. Although Roth waived some conflicts during a conflict hearing on July 7, 1987, using somewhat broad language; Roth's affidavits assert that had he known about the newly discovered evidence, he would not have waived the conflicts there revealed and would have instead sought substitute counsel. Further, it was not disclosed to the trial court that trial counsel was under a state ethics investigation for loaning money to a Greylord judge.

The Rule 33 motion was denied and the appeal (No. 88-1519) was consolidated with the appeal from the conviction (No. 87-2611). Included in the issues on appeal was the matter of trial counsel's conflict of interest. The Seventh Circuit affirmed. A timely Petition for Rehearing was filed and, with the exception of certain corrections in the original opinion, was denied on December 6, 1988. A timely Petition for Certiorari was filed in this Court on February 6, 1989.

REASONS WHY CERTIORARI SHOULD BE GRANTED

A. There is a conflict among the Circuits regarding waiver of conflict free counsel and the trial judge's responsibility during a conflict hearing.

This case presents a question of great importance to the administration of criminal law.

A conflict hearing was held by the District Judge. [A 19-32] At that hearing, the judge asked Petitioner whether he was familiar with two specific conflicts, including the inability of trial counsel to represent Petitioner in the event of plea negotiations. Petitioner answered in the affirmative and entered a broad waiver as to any potential conflicts. He indicated his desire to continue with his attorney of choice. His attorney then admitted to other possible, but undefined conflicts because of his representation of other defendants accused of similar, overlapping conduct. The District Judge accepted Petitioner's waiver without further inquiry, other than pointing out to Petitioner that he could seek other counsel if he chose to plea.

After his conviction, Petitioner discovered the existence of undisclosed conflicts between himself and his trial counsel. [A 44] Petitioner claimed that, among other things, the trial judge was put on notice regarding these potential conflicts by his attorney's admission during the conflict hearing. Petitioner

claimed that a more searching inquiry would have revealed the greater scope of the conflict problem, and that under those circumstances, Petitioner would not have entered his waiver.

The appellate court rejected Petitioner's claim holding that a judge only has a duty to

> inform the defendant of the nature and importance of the right to conflict-free counsel, and ensure that the defendant understands something of the consequences of a conflict and his entitlement to conflict-free counsel...It is enough that the defendant knows the types of risks at stake and acts with "open eyes.

United States v. Roth, 860 F.2d 1382, 1388 (7th Cir. 1988).

This approach to the conflict hearing has been taken in other Seventh Circuit cases which decline to require any narrative from a defendant and hold that a defendant can waive even serious conflicts. *United States v. Levine*, 794 F.2d 1103 (7th Cir. 1986); *United States v. Cirrincione*, 780 F.2d 620 (7th Cir. 1985); *United States v. Bradshaw*, 719 F.2d 907 (7th Cir. 1983).

In short, the Seven Circuit position is that a waiver essentially terminates the Court's duty of further inquiry. The Second Circuit has impliedly indorsed this position in *United States v. Mari*, 526 F.2d 117, 119 (2d Cir. 1975).

The position of the Second and Seventh Circuits conflicts with the posture taken by other adopted by other Circuits and with the principles recently articulated by this Court in *Wheat v. United States*, 486 U.S.____, 108 S.Ct. 1692, 100 L.Ed.2d 140 (1988).

The Fifth and Eleventh Circuits have held that a district court has an affirmative duty to conduct a searching inquiry similar to that required by a plea proceeding to determine

whether the waiver is intelligent and knowing and whether all conflicts have been identified. *In Re Paradyne Corporation*, 803 F.2d 604 (11th Cir. 1986); *United States v. Petz*, 764 F.2d 1390 (11th Cir. 1985); *United States v. Garcia*, 517 F.2d 272 (5th Cir. 1975). *Cf. Van Moltke v. Gillies*, 332 U.S. 708, 723 (1948).

Unlike the Seventh Circuit, the Fifth and Eleventh Circuit rules would have required the District Judge, upon being notified by the attorney of potential conflicts, to have more fully queried the defendant to determine whether his waiver was indeed knowing and voluntary.

The Third Circuit has also rejected the notion that a defendant's right of choice of counsel overrides conflicts, holding that the rights to a specific attorney only prevents arbitrary dismissal and provides for a fair opportunity to select alternative counsel. *United States v. Flanagan*, 679 F.2d 1072 (3d Cir. 1982); *United States v. Dolan*, 570 F.2d 1177 (3d Cir. 1978).

The First and Tenth Circuits have not adopted such explicit rules, but holdings in those Circuits support the view that a more searching inquiry is required than the one mandated in this case. *United States v. Diozzi*, 807 F.2d 10 (1st Cir. 1986); *United States v. Dressel*, 742 F.2d 1256 (10th Cir. 1984).

The holdings of the Third, Fifth and Eleventh Circuits are more in accord with the spirit of this Court's recent decision in *Wheat, supra*. The fact that the District Court has the discretion to reject a waiver strongly suggests that the Court abuses that discretion if it fails to conduct a complete inquiry, particularly if the Court has been made aware of a potential conflict. *Cf. Holloway v. Arkansas*, 435 U.S. 475 (1978) and *Glasser v. United States*, 315 U.S. 60 (1942).

B. The Decision Below Conflicts With the Reasoning of this Court in Wheat v. United States.

This Court recognized in *Wheat v. United States*, 486 U.S. ____, 108 S.Ct. 1692, 100 L.Ed.2d 140 (1987) that the trial court needed to balance the defendant's desires to be represented by counsel of choice with the interests of our judicial system for representation by counsel who are free of conflicts. In *Wheat* the government had objected and the trial court, after a careful hearing and consideration of the interests involved, refused to approve the express and knowing waiver. In the case at bar, the government made no objection and the waiver was approved without anything but a cursory hearing, and without the balancing this Court thought so important in *Wheat*.

At the outset, whether the government objects to the waiver should not be the determining factor. Here, there was an admitted and acknowledged conflict - trial counsel could not represent Roth if he wanted to plea bargain or cooperate with the government in the ongoing Greylord investigations. Plea bargaining is such an essential and integral part of criminal representation that a total foreclosure in itself precludes effective representation. And certainly, if we are to balance the interest of society, it is at least a weighty factor. Moreover, this conflict was not on the basis some self-imposed principles of defense counsel that disdained any cooperation with the government at any time for any defendant. It was because of trial counsel's past and ongoing representation of other Greylord figures. The federal district court in Chicago is where the various and sundry Greylord cases had been and would be tried. The pervasiveness of the interrelated activities among those parties was the heart of the Greylord conspiracy, as was well known to the trial court. Under these circumstances, there is almost a compelling public need for a Greylord defendant to have counsel that can effectively represent him on all important aspects of the case including conflict free advice on whether cooperation with the Government should be considered. The Court of Appeals'

opinion castigates Roth for his testimony before the Grand Jury immediately after trial. Although trial counsel correctly advised Roth he needed another attorney for the Grand Jury, the problem of the resulting testimony is more the product of the trial court's error in permitting a perfunctory waiver of the conflict for the trial, than grounds for denying relief. After withdrawal of trial counsel and substitution of new counsel on appeal, Roth again appeared before the federal grand jury (testimony under seal - not presently included in papers filed with Supreme Court).

Besides the public policy in the cooperation issue, a broad sweeping RICO conspiracy case of necessity raises the same conflict with trial strategy as the conflict with cooperation: The impact on other clients of trial counsel. Indeed, trial counsel, a distinguished member of the bar, was much sought after not only by Roth but by other Greylord defendants as the first trial of a Greylord defendant - represented by Roth's trial counsel - had resulted in an acquittal. The problem of multiple and *ad seriatim* defendants in a criminal conspiracy case should not be blissfully ignored because the defendant waives his right to conflict free counsel. The scope of cross examination, the selection of witnesses, and the decision whether the defendant should testify are all dependent on conflict-free advice. Nor can the government take total solace in arguing that Roth was a criminal defense lawyer. As the adage goes, a lawyer who represents himself has a fool for a client. The lawyer-defendant is most in need of conflict free advice.

There also can not be a waiver of conflicts not known. Roth's affidavit to the Rule 33 Motion revealed that trial counsel at the time of representation of Roth was under an ethics investigation for loaning money to a Greylord judge. To dispute Roth's claims that he was not aware of the investigation, the government filed press clippings from Chicago papers about the investigation. While it is more probable that the government and the trial judge were aware than Roth, one thing is certain - trial counsel knew he was being investigated. Yet the

government, the court, and trial counsel never raised the issue. The government did represent to the Seventh Circuit at oral argument that trial counsel was not under any criminal investigation by the United State Attorneys' office. With deference, the rational of *United States v. McLain*, 823 F.2d 1457 (11th Cir. 1987), does not rest on such a slender reed.

This case presents issues of substantial public importance concerning reoccurring problems in the administration of the criminal justice system. Because of the importance of the *Wheat* decision and because of the difference between Circuits, it is important to resolve the question of how searching an inquiry a Court must conduct when an actual or potential conflict is identified and also whether a waiver by a defendant relieves the Court of its responsibilities to inquire. This situation is likely to come up more frequently now that the discretion of the District Court has been better defined, and resolution of the conflict would aid the lower courts in their administration of criminal justice.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully Submitted,

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In the

United States Court of Appeals

For the Seventh Circuit

Nos. 87-2611 and 88-1519

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

BRUCE ROTH,

Defendant-Appellant.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 85 CR 763—**Prentice H. Marshall** and **Susan Getzendanner**, *Judges.*

ARGUED SEPTEMBER 28, 1988—DECIDED OCTOBER 26, 1988

Before CUDAHY, POSNER, and EASTERBROOK, *Circuit Judges.*

EASTERBROOK, *Circuit Judge.* Bruce Roth, the defendant in this Greylord prosecution, was a crooked lawyer. He made a living bribing crooked judges. Often Roth played the broker's role, matching lawyers who did not know which judges would take money with judges who did not know which lawyers would pay it. For these services he has been convicted of violating the Hobbs Act, 18 U.S.C. §1951, and the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961-68; he was sentenced to 10 years in prison. The only substantial issues, the only ones we discuss, are whether Roth waived

his right to conflict-free defense counsel and whether serving as bagman to three judges amounts to "association" with the court for purposes of RICO.

I

With a federal judge's approval, the Greylord investigators installed a microphone in the chambers of Wayne Olson, a judge of the Circuit Court of Cook County. The first day the bug was used, it picked up a conversation between Olson and Roth. Roth asked Olson whether Elsie, the secretary to the Chief Judge of the Circuit Court, would accept money to assign a felony case to a judge Roth preferred (doubtless because the judge also was on the take). Olson did not know; Roth suggested that Dean Wolfson, another corrupt lawyer, might. The conversation continued:

OLSON: . . . I'll ask Dean if he can do it.

ROTH: Would you do that if you remember Judge?

OLSON: I'll—you—I'll tell you what, he's not, he's gonna be here tomorrow morning. I'll tell what I'll do. I'll, I'll say Dean I heard, that over, here's what I heard that Elsie takes dough. Now Dean, you know that he's gonna tell me the truth. He's either gonna say yes, he's gonna say no, or he's gonna say I don't believe it. I never heard of that. But he's gonna be legit with me. I'll ask him tomorrow morning.

ROTH: Could you remember I'd appreciate it.

OLSON: Oh, I'll remember cause it's interesting to me.

ROTH: You got, you got me, I think I'll be back Wednesday anyway.

OLSON: I love people that take dough, cause you know exactly where you stand.

ROTH: Sure, that's the way to do business.

OLSON: {Laughs}

The easy familiarity with the judge in such ex parte conversations could not have been spontaneous. Yet Roth and Olson had not then reached their own financial modus vivendi. Wednesday came, and Roth appeared to represent two criminal defendants. Olson directed three more to Roth. During a recess Roth stopped by Olson's chambers again.

OLSON: [T]he state was going to drop the charges. I asked them if they had a lawyer Kales. They said no we don't want Kales. You go talk to them.

ROTH: Dancy and Brooks?

OLSON: There's 400 for us {inaudible}. Tell them you're a lawyer and the judge asked you to talk to 'em.

ROTH: Thank you Judge {inaudible}.

OLSON: Did you get that other one?

ROTH: Yeah, I think so. I haven't finished talking to {inaudible}.

There was "400 for us" in the representation because once the defendants were free (assured since the prosecutor planned to drop the charges) the judge could assign to Roth the "cash bond refund" owed to them. In Illinois defendants post with the court 10% of the appearance bond. If they show up as required, the court refunds this money less a fee; the court can direct the refund to the lawyer to cover legal costs. The lawyer can funnel part of the refund to the judge for services rendered—either steering the case to the lawyer, or changing its outcome. This method of bribery has been a staple of the Greylord prosecutions. E.g., *United States v. Murphy*, 768 F.2d 1518, 1526-27 (7th Cir. 1985); *United States v. Blackwood*, 768 F.2d 131 (7th Cir. 1985); *Ward v. United States*, 845 F.2d 1459 (7th Cir. 1988). Judge Olson shortly dismissed the cases in question and ordered the court to remit the defendants' money to Roth. There followed a negotiation in Olson's chambers:

ROTH: Cleared 765 for the day {inaudible}. I gave you a deuce [$200]. If it's not enough just tell me. Whatever the deal is. What's the deal {inaudible}?

OLSON: I got a guy who gives me half of what he gets.

ROTH: Fine.

OLSON: But I'd rather do business with you.

ROTH: Fine. No problem.

OLSON: But the problem is see, the problem is that he's here everyday. It's just some days I get nothing. It's a shame to have a guy come here and not have anything.

ROTH: Well I couldn't come everyday {inaudible}.

OLSON: When you're here I'll give you what I, everything I can.

ROTH: Fine. Let me know {inaudible} I cleared 765.

OLSON: Another one [$100] is fine.

ROTH: Alright.

. . .

ROTH: I got a case next week in Evanston, a big dope case in the 2nd District, 10 G's {inaudible} . . . ten grand we're talking to get rid of it. {inaudible} case.

OLSON: I didn't think you could drop in the 2nd District.

ROTH: Ah there's a couple people out there {inaudible}.

There were indeed judges in the Second District willing to take bribes, and the business there was too lucrative to permit Roth to appear daily before Judge Olson. Scooping up cash bond refunds from Wayne Olson was small beer compared to the rewards of serving as broker and bagman for Judge Alan Lane of that district. The evi-

dence, taken in the light most favorable to the jury's verdict, shows that in one armed robbery case Judge Lane told defense counsel he had "a pretty good motion" to suppress the defendant's confession but appeared reluctant to grant it. Lane told counsel to "call Bruce Roth", a direction counsel construed (correctly) as a demand for a bribe to be paid through Roth. The discussion between defense counsel and Roth revealed that Roth and Lane had discussed the case and that Lane would like to "help out" the defendant but was "not a charitable man". After Roth received $2,000 as Lane's agent, the judge suppressed the confession. Roth then collected another $2,000 to ensure a favorable outcome on the merits—a payment that turned out to be unnecessary when the state elected not to proceed without the suppressed evidence. Roth and Lane did not refund the second $2,000. (Lane, like the others we mention in this opinion, has been convicted as part of the Greylord investigation.)

Roth and Lane were a durable pair, and the arrangement was lucrative. Roth managed to have the case of Rocco Filliponio (involving cocaine and a machine gun) transferred from an honest judge to Lane, who acquitted the defendant in exchange for some $15,000. Roth took home an additional $10,000 as his fee. In still another case, Lane had convicted Michael Davis of several felonies, including rape. Roth, who had nothing to do with the case so far, dropped in on Davis in jail and told Davis that for $10,000, half for Lane and half for Roth, he could ensure success in post-trial motions. Roth later called Davis's girlfriend and told her curtly that she must produce $10,000 if she ever wanted to see Davis again.

Arrangements with Judge Adam Stillo called for still larger sums. Three persons were charged with selling cocaine to an undercover agent. Roth represented one. Judge Stillo acquitted Roth's client and convicted the two others. Roth offered to pitch in on behalf of the convicted defendants—if they would pitch in $25,000 apiece for Judge Stillo and "a contact". Roth told them it was too late to get an acquittal, but that money could palliate things.

Stillo "doesn't read case law", Roth said, but knows that money talks. On the morning Judge Stillo was scheduled to rule on post-trial motions, one of the two convicted defendants delivered $25,000 in $100 bills to Roth's secretary. The secretary received a call from Joe Stillo, Judge Adam Stillo's nephew. The secretary said: "The papers are in order." Judge Stillo sentenced the paying defendant to three years' probation; the non-paying defendant was sent to jail for six years.

II

Roth obviously needed a good lawyer. He hired Patrick Tuite, one of Chicago's leading criminal defense attorneys and the engineer of the only total acquittal that had then been obtained in any Greylord prosecution. Tuite represented several judges and lawyers in connection with charges of corruption, and at the time Roth hired him Tuite had been retained by others under investigation. This created potential conflicts of interest. Roth might find it in his interests to strike a deal with the prosecutors, who would require Roth to sing for his supper. Roth's information might inculpate one or more of Tuite's other clients. Tuite therefore said that he could not represent Roth in connection with a plea bargain; Roth agreed to this condition. Tuite properly called the potential for conflict to the attention of the court. Judge Getzendanner then questioned Roth—formerly a state prosecutor, and a member of the bar for more than 20 years—about his understanding of the situation.

The prosecutor expressed concern that in state court Tuite had represented co-defendants of both Filliponio and Davis, who were to testify for the government. In the Filliponio case, a trial for conspiracy to commit perjury, Roth himself had been among the defendants. The prosecutor wanted to be sure that Roth understood that Tuite might have learned secrets on which he would be forbidden to capitalize in defending Roth. Tuite told Judge Getzendanner that he had learned nothing that would affect or curtail his cross-examination of Filliponio and Davis.

Roth informed the court that he had discussed these matters with Tuite "at some great length, and I am well aware of all of the potential conflicts. And I don't believe are there [sic] any conflicts. And if there were some potential conflicts I would certainly waive any potential conflicts."

Judge Getzendanner persisted. She asked Tuite about the effects of his representation of other Greylord defendants and suspects. Tuite said: "I'm not exactly sure all of the things that would come up. But I represent so many people in these investigations, there's always potential conflict." Roth stated that he understood his right to conflict-free representation and again stood on his choice of attorney.

Two things went unremarked. First, Judge Getzendanner did not expressly warn Roth that if the best strategy at trial called for blackening the reputation of another of Tuite's clients, or trying to pass the buck to him, Tuite could not ethically participate in the maneuver. Second, no one mentioned that Tuite was himself under investigation by the Attorney Registration and Disciplinary Commission of Illinois on account of money given to a judge. Tuite had prosecuted or defended many a case before judges who later were charged with taking bribes, e.g., *Branion v. Gramly*, 855 F.2d 1256 (7th Cir. 1988), and was friendly with several. In 1982 he loaned $5,000 to Richard LeFevour, then Presiding Judge of the First Municipal Division of the Circuit Court, supposedly to help LeFevour pay his income taxes. LeFevour did not sign a note and did not repay until 1985, when he was indicted for taking bribes and wanted Tuite to defend him. (The defense was unsuccessful. *United States v. LeFevour*, 798 F.2d 977 (7th Cir. 1986).) Even then LeFevour repaid without interest. Tuite had no cases before LeFevour. The Disciplinary Commission recommended that Tuite be censured for giving a judge a thing of value. Tuite's defense was that he did not know it is forbidden to do so. Although finding that Tuite had violated Disciplinary Rule 7-110(a) ("A lawyer shall not give or lend any thing of value to a judge, official, or employee of a tribunal, except that a lawyer

may make a contribution to the campaign fund of a candidate for such office."), the Supreme Court of Illinois discharged him without sanction on the ground that the rule had not been authoritatively construed in earlier cases. *In re Corboy*, 1988 Ill. LEXIS 89 (June 20, 1988).

Roth contends that the investigation shows that Tuite may have had a reason to pull punches at the trial. If he was *too* vigorous, Roth contends, he might have annoyed the prosecutors; grouchy prosecutors might have wondered whether this loan was in reality a bribe, and started a criminal investigation of Tuite. Roth says that he detects signs of lackadaisical work in Tuite's handling of the trial, and that in particular Tuite's failure to call Roth as a witness in his own defense must be attributable to a conflict—either to avoid eliciting from Roth evidence that could damage other clients or to avoid the enmity of the prosecutor. In particular, Roth believes, Tuite kept him from testifying in order to prevent the prosecutor from cross-examining him about bribes to Judge John McDonnell, one of Tuite's clients who was then a target of the ongoing investigation. (McDonnell has since been indicted.) To cap things off, Roth points out that as soon as Roth was convicted and was called before the Greylord grand jury, Tuite took his leave, for he could not represent one who might injure another client; so too with Roth's testimony at trial, Roth submits.

After his conviction, Roth filed a motion for a new trial based on this conflict. The motion was assigned to Judge Marshall, Judge Getzendanner having resigned in the interim. Judge Marshall declined to hold a hearing to investigate the conflict more fully and denied the motion for a new trial. The only concrete claim of prejudice stemmed from the decision not to put Roth on the stand. Judge Marshall pointed out that during trial Judge Getzendanner forcefully told Roth that he was entitled to testify in his own defense. Roth waived his right on the spot and did not suggest that he wished to testify but that Tuite had talked him out of it or declined to assist him. The ensuing conviction may have led Roth to take a dif-

ferent view of things, but that was hardly a ground for a new trial, Judge Marshall concluded. Any remaining conflicts were adequately covered during the hearing before Judge Getzendanner, he ruled, because Roth waived all conflicts, actual and potential.

Roth's contention that in order to protect Judge McDonnell, Tuite prevented him from testifying amounts to the claim that he twice lied in court: once when he told Judge Getzendanner that the decision not to testify was his own, and once when (after his conviction) he told the Greylord grand jury that he had never given money to Judge McDonnell. (Tuite would not have had a conflict if Roth were prepared to testify at trial that he had not paid off Judge McDonnell.) We see no reason to allow Roth to treat his declarations so lightly. His statements show that (a) there was no conflict concerning McDonnell, and (b) any conflict was not the cause of his decision not to testify. A judge is not required to give a defendant a hearing so that he can contradict statements made in court. *United States v. Ellison*, 835 F.2d 687, 693 (7th Cir. 1987). Hearings are designed to resolve disputed questions of fact. Roth, as defendant and witness, showed that there is none. If it were easy to take back such statements, people would be less candid when they speak. Roth knew when he answered Judge Getzendanner, and the questions from the grand jury, that he was engaged in serious business. The courts took him seriously then; we take him seriously now.

Only the validity of the original waiver need concern us. Roth's argument takes a familiar form. True, he says, I waived all conflicts, actual and potential. But the waiver was not voluntary because I did not know about all potential conflicts. Waiver is an intentional relinquishment of a known right. By definition, one cannot relinquish a right when one does not know salient facts. Worse, the information that led me to waive my rights came from Tuite; since he had a conflict, he was not a reliable source of information, rendering my waiver invalid unless the judge made everything clear in court. Yet the judge did not mention all possible forms of conflict. Therefore, the argument concludes, the waiver was ineffectual.

This is a familiar argument because it is available after every waiver, no matter how detailed the warnings preceding the waiver. We do not require a judge to follow a script in eliciting waivers of this sort. It is therefore always possible to say that the judge could have mentioned one more thing. Any conflict serious enough to call for reversal in the absence of waiver will have several facets and potential consequences. Hearings to flush them all out would be extended—and even then would be incomplete.

The right question, though, is not whether the judge told the defendant everything. No choice of any kind is made with perfect information, and hindsight always turns up some additional snippet. The question is whether the defendant knew enough to make the choice an informed one—a rational reconciliation of risks and gains that are in the main understood. A choice may be intelligent and voluntary in this sense even though made without potentially-important information. *Moran v. Burbine*, 475 U.S. 412 (1986), shows this. Burbine had been arrested and was under interrogation. The police knew, but did not tell Burbine, that a lawyer retained by his sister was trying to get in touch with him. Burbine confessed, and the Court concluded that the confession was voluntary because he understood his entitlements and what it means to confess. "No doubt the additional information would have been useful . . .; perhaps even it might have affected his decision to confess. But we have never read the Constitution to require that the police supply a suspect with a flow of information to help him calibrate his self-interest in deciding whether to speak or stand by his rights." 475 U.S. at 422.

There are of course several meanings of "waiver". Courts use this word to reflect a variety of degrees of knowledge. See *Johnson v. United States*, 838 F.2d 201, 204 (7th Cir. 1988). Sometimes simply knowing the existence of the right is enough. We say, for example, that a defendant waives his right to trial by jury if he is aware that the right exists yet opts for a bench trial (or pleads guilty); we do

not insist that he have present to mind the complex strategic and tactical differences between bench and jury trials, and the consequences these may have for his fate. See *United States ex rel. Williams v. DeRobertis*, 715 F.2d 1174 (7th Cir. 1983). Courts require more when the right in question is the right to counsel, *Johnson v. Zerbst*, 304 U.S. 458 (1938); *Von Moltke v. Gillies*, 332 U.S. 708, 724 (1948) (plurality opinion), or the right to counsel free from conflict of interest, *Cuyler v. Sullivan*, 446 U.S. 335 (1980). The difference stems from the role of counsel: the lawyer rather than the court is the principal source of advice about rights and their use (or relinquishment). *Moran* cannot be distinguished on this ground, however, because it was about access to legal assistance.

Even when the right to counsel is at stake, courts may accept the defendant's waiver so long as they know that he understands the kinds of risks involved and has a reason for making his choice. Any more stringent standard imprisons a defendant in his privileges. If warnings must be elaborate and comprehensive after the fashion of a prospectus in a securities offering, it is correspondingly easy to escape from the waiver after trial. Neither judges nor prosecutors want to offer the defendant two trials per case. They would predictably decline to allow waivers in some percentage of cases, which *Wheat v. United States*, 108 S. Ct. 1692 (1988), says they can do. The more stringent the warning rules, the easier it is to obtain a reversal after a conviction; the easier it is to obtain a reversal, the more judge and prosecutor will resist the attempt to waive; the more they resist, the harder it is for the defendant to obtain the services of the lawyer he prefers. Roth now invokes *Wheat* for the proposition that because a court *may* decline to allow representation by a lawyer with a conflict of interest, sometimes (and here) the court *must* do so, or at least conduct an exceedingly rigorous interrogation before accepting the waiver. The right to conflict-free counsel may be waived, *Holloway v. Arkansas*, 435 U.S. 475, 483 n.5 (1978). The Supreme Court held in *Wheat* that a court may reject a proffered waiver, in part to prevent the strategy Roth now pursues: first waiving the

right and then taking back the waiver after conviction. 108 S. Ct. at 1698. None of the language in *Wheat* suggests that the Court was enlarging the defendant's arsenal of rights; and if we were to read *Wheat* the way Roth prefers, that would in the long run reduce defendants' entitlements by making waivers more difficult, which would induce courts to deny defendants the services of the lawyers they prefer.

So we adhere to the rule that has long prevailed in this circuit. A judge should inform the defendant of the nature and importance of the right to conflict-free counsel, and ensure that the defendant understands something of the consequences of a conflict and his entitlement to conflict-free counsel, but the waiver is not like the signature on a bond indenture. It is enough that the defendant knows the types of risks at stake and acts "with open eyes". *United States v. Beniach*, 825 F.2d 1207, 1210 (7th Cir. 1987). A waiver given after such knowledge is binding. *Bridges v. United States*, 794 F.2d 1189, 1194 (7th Cir. 1986); *United States v. Levine*, 794 F.2d 1203, 1206 (7th Cir. 1986); *United States v. Cirrincione*, 780 F.2d 620, 627 (7th Cir. 1985); *United States ex rel. Tonaldi v. Elrod*, 716 F.2d 431, 438-39 (7th Cir. 1983). More extensive discussions may be useful, and we encourage them. The district judge knew that Tuite represented other Greylord defendants, and it would have made for a more intelligent choice—and not incidentally have eliminated the need for these appellate proceedings—if the judge had gone into greater detail. Extended colloquys are not, however, necessary conditions of valid waivers. "We do not intend . . . to condone [an] effort by [a defendant] to benefit from his own informed choice of an attorney. It smacks of bad faith and of a deliberate design to lay a groundwork for this appeal when all else had failed." *Bridges*, 794 F.2d at 1194.

Roth's waiver was valid. He has been a lawyer for more than 20 years and knows what conflicts of interest are and their consequences. He knew that Tuite represented other Greylord defendants and suspects—Tuite's experience

was what made him attractive. Tuite said in court that he would not do anything that jeopardized other clients. Roth may not have known who those clients were, but (a) he could have asked, and (b) with the McDonnell business out of the way, none of them was pertinent to the charges against Roth. Roth does not contend that he inquired and that Tuite balked, or anything similarly troubling. Tuite's loan to LeFevour had been discussed in the press before Roth's trial. The prosecutor and judge knew no more about it than Roth did. A lawyer might pull punches to avoid investigation by the prosecutor, but the investigation in question was not being conducted by the federal government, and it was removed from the focus of Greylord. (The prosecutor assured us at oral argument that the United States Attorney has not opened an investigation of Tuite, and Roth does not contend that the FBI ever did so.) Tuite's loan had nothing to do with any pending case and therefore was at worst an unseemly effort at ingratiation rather than a quid pro quo, so that prosecution was unlikely. A prosecutor might like to have defense counsel at his mercy, but that is not a reasonable description of these events. Roth hired Tuite because he was an insider in the Cook County courts and knew the Greylord business stem to stern; that Tuite might have become too tight with state judges for his own good does not undermine the voluntary quality of Roth's choice.

If we were to assume that Roth's waiver did not encompass undisclosed potential conflicts or the state's investigation of Tuite, this would made no difference because Roth has not established that the potential conflict became actual and adversely affected trial counsel's performance. See *Cuyler*. Neither Tuite's representation of Judge McDonnell nor the Disciplinary Commission's investigation of Tuite created an actual conflict adversely affecting Tuite's ability to defend Roth zealously. Actual conflicts that adversely affect counsel's performance must be established by specific instances in the record. *Cirrincione*, 780 F.2d at 629. The possibility of divided loyalties is insufficient proof of actual conflict, *id.* at 630 n.4; rather, the defendant

must show specific instances where his attorney "could have, and would have, done something different." *Id.* at 630-31. See also *United States v. Horton*, 845 F.2d 1414, 1418-19 (7th Cir. 1988) (claim that defense lawyer might have pulled his punches because he was under consideration for appointment as United States Attorney does not demonstrate a conflict of interest). Even if Roth's decision not to testify was based on Tuite's advice, which is unlikely, there is no evidence beyond Roth's conjecture that the advice was the product of an actual conflict rather than the product of a prudent defense strategy.

III

RICO makes it a crime to "conduct or participate" in the affairs of an "enterprise" through a pattern of racketeering. 18 U.S.C. §1962(c). The parties stipulated that the Circuit Court is an "enterprise" for purposes of RICO, but Roth obviously did not conduct its affairs. The indictment charged that he participated in its affairs by bribing judges and serving as their collection agent. The "participation" aspect of the RICO crime often is known as "association" with the enterprise. The district judge instructed the jury "as a matter of law that a person who solicits or accepts bribe money on behalf of a Circuit Court judge is associated with the Circuit Court of Cook County." Roth contends that this instruction is incorrect.

Roth objected to this instruction at trial, but without details. Fed. R. Crim. P. 30 states: "No party may assign as error any portion of the charge . . . unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which that party objects and the grounds of the objection." An objection must state grounds; "I object" is not enough. The rule ensures that the district judge will be alerted to the nature of the problem, so that error may be averted. An objection that does not point out the problem in the instruction is insufficient because it does not give fair prospect of timely correction. See, e.g., *United States v. Markowski*, 772 F.2d 358, 362-63 (7th Cir. 1985); *United States v. Kehm*, 799 F.2d 354, 362-63 (7th Cir. 1986). Counsel here stated:

> We had one objection to the government's instructions . . . which has to do with association with the Circuit Court based on our position that Mr. Roth was not associated with the Circuit Court. . . . [W]e are objecting to that on the grounds that we believe he is not associated.

This objection does not alert the court to a claim that the instruction is based on an incorrect appreciation of RICO. Counsel stated that it was the defense view that Roth "was not associated" with the court, which is essentially a plea for the court to resolve the issue in Roth's favor rather than put any question to the jury. If counsel wanted to preserve the point now pressed—that the definition of "association" should be left to the jury, or that other circumstances might be pertinent—he should have been more direct. If the objection was adequate, it was barely so.

We need not decide whether this objection made the grade, however, because any error was harmless. The instruction did not take any factual issue away from the jury. It simply told the jury a legal consequence of a finding on a disputed fact. The court told the jury that *if* it should find that Roth had carried payments to judges, *then* Roth would be "associated" with the court for purposes of RICO. Under *United States v. Yonan*, 800 F.2d 164 (7th Cir. 1986), participation in a bribery scheme is enough to make out "participation" in the affairs of the court, the statutory requirement. See also *Yellow Bus Lines, Inc. v. Drivers Union*, 839 F.2d 782, 792-94 (D.C. Cir. 1988).

Roth might have had an argument that circumstances *other* than carrying the judges' money could be pertinent to the finding of "association"; if there are other legally relevant circumstances, the jury must consider them. We refrain from rambling through the wilds of RICO, for counsel did not suggest any such circumstance, and it is hard to imagine what one might be. Juries do not make up their own rules of law, and judges ought to tailor their instructions as close as possible to the facts of the case,

the better to inform juries about what they must deliberate on, and what their conclusions mean. The bare possibility that in another case some other circumstance might negate "association" even when the defendant has served as a bagman is no reason to give an elaborate hypothetical instruction in this case. The instruction given dealt with the factual dispute these parties had, and it accurately stated the legal consequence of resolving this particular dispute in a particular way.

AFFIRMED

A true Copy:

Teste:

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United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

December 6, 1988.

Before

Hon. RICHARD D. CUDAHY, Circuit Judge

Hon. RICHARD A. POSNER, Circuit Judge

Hon. FRANK H. EASTERBROOK, Circuit Judge

UNITED STATES OF AMERICA, *Plaintiff-Appellee.*	)	Appeals from the United States District Court for the Northern District of Illinois, Eastern Division. No.85 CR 763 Prentice H. Marshall and Susan Getzendanner, Judges
Nos. 87-2611 and 88-1519 v.	)	
BRUCE ROTH, *Defendant-Appellant.*	)	

Order

The opinion issued on October 26 is amended in the following respects.

1. The parenthetical sentence at page 5 lines 16-18 is deleted.

2. The first full paragraph at page 9 is deleted and replaced by the following paragraph:

> Roth's contention that in order to protect Judge McDonnell, Tuite prevented him from testifying amounts to the claim that he twice was less than candid with the court: once when he told Judge Getzendanner that his decision not to testify was his own, and once when (after his conviction) he told the Greylord grand jury that he had never given money to Judge McDonnell. Tuite would not have had a conflict if Roth were prepared to testify at trial that he had not paid off Judge McDonnell. We see no reason to allow Roth to treat his declarations so lightly - and this even though in still further appearances before the grand jury Roth has sung still another tune. His statement at trial, and his initial testimony before the grand jury, show that there is no reason to suppose that Tuite feared his testimony. Roth does not suggest that Tuite anticipated that Roth would inculpate McDonnell on the stand, had he testified, and unless he would have done so, Tuite had no conflict. Roth appears to be playing games with the judicial system, telling Judge Getzendanner and the Greylord grand jury one thing, then changing his story when that suits his purposes. A judge is entitled to hold a defendant to statements made in open court and need not give him a hearing so that he may more readily contradict himself. United State v. Ellison, 835 F.2d 687, 693 (7th Cir. 1987). The tune Roth was singing at (and shortly after) trial showed that there was no conflict. If it were easy to take back such statements, as Roth tries to do, judgments could not be final. The trial is the forum to which a defendant must present his claims: he may not tell one story to the trial judge and then complain on appeal that the judge believed him. Judge Getzendanner was entitled to take Roth seriously, even though (he now tells us) he had his fingers crossed behind his back.

Defendant-Appellant filed a petition for rehearing on November 9, 1988, together with a motion to seal the petition for rehearing and attachments. All of the judges on the panel

have voted to deny rehearing. The petition for rehearing is therefore DENIED. The motion to seal is GRANTED.

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	Docket No. 85 CR 763
	)	
	)	Chicago, Illinois
v.	)	Thursday July 9, 1987
	)	10:30 o'clock a.m.
BRUCE ROTH,	)	
	)	
Defendant.	)	

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE SUSAN GETZENDANNER

APPEARANCES:

For the Plaintiff: MR. PATRICK DEADY

For the Defendant: MR. PATRICK TUITE

Court Reporter: MS. MAELLEN PITTMAN
(312) 435-5576

THE CLERK: 85 CR 763, United States versus Roth.

MR. DEADY: Good morning, your Honor. For the record, Patrick Deady on behalf of the United States.

MR. TUITE: Good morning, your Honor. Patrick Tuite on behalf of Mr. Roth, who is present.

Judge, I apologize about Monday. I had forgotten, I was probably so relieved that I had the time off, and I went to trial again at 26th Street. Since. So I –

THE COURT: All right. Well, that's a surprise.

MR. TUITE: Yes, they got to see me out there for a change. But –

THE COURT: Well, I give you time and then you put me on the back burner, Mr. Tuite. I don't know. It's not fair.

MR. TUITE: We worked it out. We got the jury in the box and they capitulated. So I am out of trial.

THE COURT: Okay.

MR. TUITE: A couple of matters, Judge. Obviously, under the McNally decision the government is going to have to reindict this case. Because the Court well knows a lot of the counts here are intangible rights mail fraud. And they said that they will done next week.

THE COURT: Right.

MR. TUITE: I don't know if that – I think the facts will remain the same. I don't know if –

MR. DEADY: Judge, virtually all the mail fraud counts were also alleged in the RICO counts of the indictment as Illinois

state bribery offense. There is I think probably two or three mail frauds that were not charged as racketeering events; and specifically I think based on cash bond refunds that were received on September 23, 1980.

So that may result in an additional racketeering event described as an Illinois state bribery violation, as opposed to the mail fraud violation.

But the proof is going to remain the same. That is all part of the Wayne Olson and Title III aspects of the case. All the transcripts of those dates have been available to the defendant. The conversation between the defendant and Wayne Olson, and also between Terry Hake and the defendant have all been produced to Mr. Tuite.

So I don't believe it's going to affect in any significant way the trial in the case, although, as I was commenting to Mr. Tuite, I didn't think -- if the statute hadn't run, if those weren't 1980 mailings I think that we would probably reindict under a scheme to obtain money. Because I think this case clearly is one that would not be affected but for the Statute of Limitations by McNally. And -- because I think there was still a scheme to obtain money by means of false statements by both Judge Olson and by the defendant in this case which resulted in profits both to MR. Olson and Mr. Roth.

THE COURT: But you think the Statute of Limitations prevents you even though you had these intangible rights.

MR. DEADY: There has been discussion in out office as to whether or not we can -- we have indicated on an intangible rights theory and the statute has been tolled by the filing of that indictment.

THE COURT: Right.

MR. DEADY: Whether or not we can go back and reindict on a new theory. And this case -- doesn't seem to be much point to it in light of the fact all of the same evidence is going to come in on the mail fraud.

THE COURT: All right.

MR. DEADY: And mail fraud evidence is going to come in the RICO prosecution in any event.

Some other cases, that may be different where it's only straight mail fraud.

THE COURT: All right. We had set this matter for a conflict hearing because we thought that was important to get resolved because the trial date is fast approaching.

MR. TUITE: There is -- Mr. Roth is here. I discussed with him the matter. It would only arise in the course of negotiations with the government. Mr. Roth is not interested in any negotiations. He does not feel there is any conflict in this matter going forward on trial.

THE COURT: Okay. So the conflict -- the potential conflict that you might have would affect your ability to negotiate a plea with the government.

MR. TUITE: That's correct, Judge.

THE COURT: But the defendant doesn't want to negotiate a plea with the government.

MR. TUITE: Right.

THE COURT: Therefore --

MR. DEADY: My only question, your Honor -- I understand Mr. Tuite's concern about the conflict that was

discussed in chambers. I'm not really sure of the parameters of that conflict.

But I would just like to bring out to the Court – although I discussed with Mr. Tuite and we briefly mentioned it in chambers, as long as the defendant is here I think he should aware that because of Mr. Tuite's prior representation of other defendants in two specific state cases, there may be -- arise conflicts in the course of the cross examination of certain witnesses.

One of the defendants in the state case that Mr. Roth was involved in in the perjury case is Rocco Filliponio, who is going to be a government witness in this case. He was not represented by Mr. Tuite. Mr. TUite represented another defendant in that case, I believe an attorney Mike Saygan. Mr. Roth was represented by someone else.

THE COURT: Mr. Roth?

MR. DEADY: Mr. Roth was also a co-defendant in that case. He was acquitted. Mr. Filliponio was convicted.

I read the transcripts of that case and there was a significant amount -- essentially it was a joint defense in the sense that they all had the same theory, although they obviously independently cross examined the main government witnesses in the case.

But I'm not sure whether or not there was any shared information with Mr. Filliponio's attorney with Mr. Tuite, and Mr. Filliponio is going to be a witness. He was a former client of MR. Roth's. And who is going to testify for the government.

I don't – that is a potential conflict at best, Judge. I just thought it was best to bring that up.

There is a second witness in the government's case that we expect to call, and possibly another witness in the same matter. One of the racketeering events involves an allegation concerning Michael Davis' case. And MR. Michael Davis was not represented by Mr. Roth, although he -- at least the government alleges -- was approached by Mr. Roth with an offer to have his case fixed before a judge who the case was pending in front of.

Prior to Mr. Roth's approaching Michael Davis, he or members of his family were approached allegedly by Arthur Zimmerman, an attorney who was represented by Mr. Tuite in a state trial which resulted in the dismissal of the charges against Mr. Zimmerman on the theory that Mr. Tuite has espoused here with respect to the Illinois State Bribery Act; that is, that an attorney can accept money regardless of what he says he is going to use it for.

That case went to disposition. It was ultimately decided by the judge that -- he acquitted the defendant.

But again, there is an -- overlapping witnesses, there was some overlapping -- there is going to be some overlapping testimony with respect to that earlier attempt by Mr. Zimmerman to try to get the case fixed.

Again, Mr. Tuite had an interest in a separate defendant in that case, and I'm not sure what the potential problems would be. He would be the best one. And he has indicated that he doesn't believe there is a conflict.

But I think that the defendant should be aware at least of those potential problems to arise; that if he needs to discuss those further with Mr. Tuite, he should do so.

THE COURT: Mr. Tuite, are these the two things that you've discussed with Mr. Roth?

MR. TUITE: Yes. He knows about the two matter, We have discussed them.

In the Filliponio case the defendant, Mr. Filliponio, as well as Mr. Roth and his lawyer, and two other lawyers, were indicted for conspiracy to commit perjury. And it arose out of Mr. Filliponio bringing a witness to his lawyer and saying, this witness can corroborate my story. And the witness was presented on the stand and testified, and the defendant in that case was acquitted. And later Filliponio -- it turned out that the woman was not there. And Mr. Filliponio was convicted of perjury. But his lawyers and the other lawyers in the case were not.

I never talked to Mr. Filliponio. I never discussed it with him. Mr. Adam represented him. I never discussed any information from Mr. Adam except what we had in discovery from the state, and we all used that to cross examine.

So I don't think there's any -- I never learned anything in confidence from Mr. Filliponio or his lawyer.

THE COURT: All right. What about the other matter?

MR. TUITE: The other matter, I don't see a conflict. What that involved, Judge, is Mr. Zimmerman ended up representing this Michael Davis. Mr. Zimmerman was able to obtain a new trial for Mr. Davis. It was alleged that Mr. Zimmerman received monies from the Davis family with an understanding he was going to pay a judge. That's the Zimmerman case that's been cited.

Mr. Roth is alleged to have seen the Davis family, or Davis, saying hire me, in a sense, and I can represent you successfully. That's the allegation here.

I don't see where there's a conflict. My defense isn't going to be -- or even if it were, look, he didn't do anything, this other lawyer did it. It's not going to affect the other lawyer

because what I say isn't evidence and the other lawyer has been acquitted. But that doesn't seem to me a viable defense anyhow. I am not going to raise that.

The fact is Mr. Roth did not end up representing Michael Davis; never got any money from him, never represented him. So I don't see a conflict there at all.

MR. DEADY: I have nothing to add.

THE COURT: All right. Mr. Roth, it's important that you understand all these facts, and you have heard both the prosecutor and Mr. Tuite discuss these two incidents.

Based on what Mr. Tuite tells me, I don't see any actual conflict. Not by a long shot. There is always a potential for conflict in that while Mr. Tuite might be cross examining a witness he might -- his cross examination might be impeded in some way, but we don't know based on what we know today as to the facts that anything like that would ever occur. But you've heard it discussed.

Are you familiar with these two incidents?

THE DEFENDANT: Yes, Judge. I fully discussed everything with Mr. Tuite at some length, and I am well aware of all of the potential conflicts. And I don't believe are there any conflicts. And if there were some potential conflicts I would certainly waive any potential conflicts.

I do want Mr. Tuite to continue representing me in the case. THE COURT: All right. Now, where even Mr. Tuite acknowledges a potential for conflict would be in any plea negotiations that might be conducted with the government.

That apparently is something that would concern you, Mr. Tuite. Is that correct?

MR. TUITE: It might, Judge. It may concern me. I'm not exactly sure all of the things that would come up. But I represent so many people in these investigations, there's always potential conflict.

THE COURT: All right. So we don't have to explore what those potential conflicts are. Let's assume that they exist. Mr. Tuite then would be unable to represent you in terms of any plea negotiations.

You are telling -- he tells me that you have no intention of engaging in such negotiations, and that's your decision. But I want to make sure you understand that negotiating a plea is an important part of the process. Being able to have a lawyer who is able to negotiate with the government without any conflict of interest is a very important right.

Do you understand that?

THE DEFENDANT: Yes, your Honor, I do.

THE COURT: And, you know this sort of thing, plea negotiations, even though you might presently intend not to negotiate, that situation may change, and it may change at the last minute very close to trial, or we are actually on trial.

I suppose at that point, Mr. Tuite, some other lawyer could represent him.

MR. TUITE: I've advised Mr. Roth of that, that if he does change his mind and wishes to negotiate, that it would be best that he retain other counsel for that purpose. He has agreed to do that if that does arise.

THE COURT: All right. So you understand that Mr. Tuite could not represent you should you change your mind about negotiating with the government. But it seems to me the problem would be solved if other counsel were brought in.

Do you understand that?

THE DEFENDANT: I am fully aware of that, you Honor, yes.

THE COURT: All right. All right. So what do I owe you in terms of decisions on motions?

MR. TUITE: There is just the minimization, Judge.

THE COURT: Okay.

MR. TUITE: There is another matter. It sort of came up here today. And we'd like to raise it again when we see the new indictment -- but this Davis matter that was just talked about.

The allegation in the indictment, as you know, is that the defendant is a RICO enterprise; that he is associated with the Circuit Court of Cook County in light of the Yonin decision: that if you, I suppose, pay money to somebody in an office you are therefore associated with office.

The allegation in Davis is that he only approached Davis and said, hire me because I can take care of the judge, and Davis didn't.

I would like to reraise that or have you reconsider that on the theory that he is not associated with the Circuit Court if he never is hired and he never gets the money and nobody is paid. It's just an offer, from the government's standpoint, as a solicitation of: Come to me, and if you hire me I can do you well. And I don't know how that makes him associated with the Circuit Court.

And the other is where the government says he did receive money and he said he paid money. There is some -- maybe evidence of association.

MR. DEADY: Well, Judge, I don't --

MR. TUITE: We want to raise -- I am not going to argue it here, but I just thought we might want to raise that when we see the new indictment.

MR. DEADY: Mr. Tuite's description of the facts is somewhat different than the government would suggest would be the appropriate analysis of whether or not he is associated with the enterprise . Whether or not he is successful in obtaining clients on each and every occasion I don't think is relevant to determine whether or not he is associated with the Circuit Court of Cook County to the extent that he becomes or conducts business or participated in the conduct of the business of the enterprise.

The fact is that the evidence would show that at least he and agents for him attempted to solicit money from a defendant who he did not represent, with the promise that the money -- part of the money would go to pay the judge.

And this is a bribery under -- a solicitation to commit bribery under the Illinois Bribery Statute. It fits under the pattern of racketeering event I don't think is required under the RICO statutes.

MR. TUITE: That is not the question. The question is is he associated with the Circuit Court of Cook County in that instance. That's the question.

THE COURT: Does he have to be associated in connection with each and every incident? That's Mr. --

MR. TUITE: That's the question.

THE COURT: That's the question.

MR. TUITE: Because it seems under Yonin you become associated with the enterprise when you pay somebody in the enterprise.

THE COURT: But it may very well be that if you have a pattern and practice of making these payments that you are associating generally, and then if you -- on the basis on --

MR. TUITE: Right. This isn't an isolated incident involving a judge. This is the same judge who comes up in at least two other of the racketeering events. So, I mean, it's not where he is.

MR. TUITE: We want to look at it, and we may want to-

MR. DEADY: We will file it by next Friday, Judge. 30 days before the date of the trial.

THE COURT: All right. So you are going to file by Friday.

If you are going to file any motions directed at any count it will have to be the following Friday.

MR. TUITE: Fine.

THE COURT: So that we can have that. And I will rule on the minimization as promptly as possible.

MR. DEADY: Thank you, Judge.

MR. TUITE: Thank you.

THE COURT: How long are we estimating for trial?

MR. DEADY: Two weeks.

MR. TUITE: I think that's fair.

THE COURT: Okay.

(Which were all the proceedings heard this date.)

CERTIFICATE

I hereby certify that the foregoing is a true and accurate transcript from the original shorthand notes in the above-entitled case.

/s/_____ _____

Maellen E. Pittman Date

Official Court Reporter

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,	) No. 85 CR 763
Plaintiff,	)
	) 219 South Dearborn Street
vs.	) Chicago, Illinois 60604
	) Monday, February 22, 1988
BRUCE ROTH,	) 9:30 o'clock a.m.
Defendant.	)

TRANSCRIPT OF [rule 33] PROCEEDINGS

BEFORE THE HONORABLE PRENTICE H. MARSHALL

APPEARANCES:

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Northern District of Illinois, by:
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For the Defendant: WILLIAM VANDERCREEK, Esq.

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THE CLERK: 85 CR 763, USA versus Bruce Roth, for status and ruling.

MR. ZENNER: Morning, Judge. Sheldon Zenner on behalf of the United States.

MR. VANDERCREEK: Good morning, your Honor. William VanDercreek for Bruce Roth.

THE COURT: Well, let me get my papers out here now. Here they are, up here.

Just really more out of curiosity than anything else, was a post trial motion submitted to Judge Getzendanner?

MR. ZENNER: Post trial motions were submitted to Judge Getzendanner by Mr. Roth's prior attorney.

THE COURT: Tuite?

MR. ZENNER: Right. And they were denied.

MR. VANDERCREEK: The conflict issue was not presented, to my understanding.

THE COURT: No, I think that that's – well, I have gone over all of these papers, as I told you that I would, and I've got a few things to say this morning which I hope are adequate for the purpose to which they are addressed.

First, as Mr. VanDercreek points out, while the language of Rule 33 of the Federal Rules of Criminal Procedure is a bit ambiguous, the United States Supreme Court in United States against Cronic, C-r-o-n-i-c, 466 US 648 at 659 ruled that a District Court in this situation has jurisdiction to entertain a newly discovered evidence motion under Rule 33, and to either

deny the motion on its merits, or to certify its intention to grant the motion to the Court of Appeals which could then entertain a motion to remand the case.

Of course, I sit in this case in lieu of Judge Getzendanner who was the Trial Judge, and who has since resigned from the bench.

I've reviewed the submissions which have been made in support of the motion for new trial.

Insofar as the conflict of interest prong of the motion is concerned, Mr. Tuite's own difficulties, if any, with the Attorney Registration Commission are in my judgment not grounds from which we can infer that a conflict of interest existed between Mr. Roth and Mr. Tuite so as to compel Tuite to withdraw from he case or to compel Judge Getzendanner to conduct an inquiry with regard to Tuite's representation of Mr. Roth.

I don't mean to suggest that it is frivolous to urge that issue in light of the overall situation that has confronted Mr. Roth, but that is not a basis for relief in my judgment.

Insofar as Mr. Roth's allegation is concerned which appeared in his earlier filings, that Mr. Tuite would not permit him to testify, and Mr. Roth now asserts because Tuite was fearful that Roth's testimony would implicate some of Mr. Tuite's clients, the record is clear that when Mr. Roth and Mr. Tuite announced that the defendant would rest his case without testifying in his own behalf, that Judge Getzendanner admonished Mr. Roth as she was obliged to do under the precedent of this Circuit, and obtained from him a knowing, intelligent and voluntary waiver of his right to testify.

And no suggestion was made at the time of that colloquy, which appears fully of the record, that Mr. Roth was being compelled not to testify by his lawyer, or that he wanted to testify and Mr. Tuite wouldn't permit him to testify, or you're a derelict

at sea on your own, I'm not going to question you, I'm just going to let you sit up there and tell your narrative story.

None of those suggestions, which now appear, appear with regard to the record which was made by Judge Getzendanner.

In short, Mr. Roth's waiver of his right to testify was covered by Judge Getzendanner and, of course, it is for the Court of Appeals to determine whether she adequately handled the situation.

I think she did, but that is not my jurisdiction to assess. That is for the Court of Appeal to assess.

Now, we turn then to the question of direct conflicts with other clients.

Certainly, certain aspects of these alleged direct conflicts were made known to Mr. Roth.

Mr. Tuite right up front, as I understand the record in the case – maybe not too up front, because I don't quite understand and I'm not seeking explanations when I make these observations, but I don't quite understand why an indictment which was returned in 1985 didn't go to trial before Judge Getzendanner who was very punctual in her trial calendar – why it didn't go to trial until late 1987. But maybe that's because Tuite was off trying other cases at other times.

But, in any event, well before trial, it is evident that Mr. Tuite had told Mr. Roth and had told Judge Getzendanner that in the circumstances which confronted Tuite, he could not undertake to represent Roth in any plea negotiations which would implicate Roth participating in any cooperation with the Government, because there was a risk that Mr. Roth's cooperation might implicate or incriminate others of Mr. Tuite's clients.

Mr. Roth was made aware of that. Judge Getzendanner was made aware of that. And Mr. Roth expressly waived any complaint with regard to that aspect of Tuite's alleged conflicts.

And as I understand these papers now, he's really not trying to depart from that position.

Then, there was the Art Zimmerman and Wexler incidents and the Filliponio incident, and so forth, and they are sort of intertwined.

They are not three of them, but one of them arises out of the Filliponio case and one arises out of Zimmerman's case. I guess Wexler is yet -- still another aspect, and that I will come to momentarily.

But those matters were expressly discussed on the record with Mr. Roth, and he acknowledged his awareness of them and the fact that those conflicts did not present an impediment to his representation by Mr. Tuite in the trial of the case.

Then in that context, Mr. -- Or Judge Getzendanner talked with Mr. Roth who, after all, is a lawyer, experienced in the criminal justice system -- she talked to Mr. Roth at page nine of the transcript of July 9, 1987.

She said, "Mr. Roth, it's important that you understand all of these facts, and you have heard both the prosecutor and Mr. Tuite discuss these two incidents," referring to the Filliponio incident and to the Zimmerman incident.

Then she goes on:

"Based on what Mr. Tuite tells me, I don't see any actual conflict, not by a long shot. There is always a potential for conflict in that while Mr. Tuite might be cross examine a witness, he might -- his cross-examination might be impede in some way,

but we don't know, based on what we know today as to the facts, that anything like that would occur.

"But you've heard it discussed. Are you familiar with these two incidents?"

And Mr. Roth responds, " Yes, Judge, I fully discussed everything with Mr. Tuite at some great length, and I am well aware of all of the potential conflicts, and I don't believe there are any conflicts.

"And if there were some potential conflicts, I would certainly waive any potential conflicts. I would certainly waive any potential conflicts," he tells Judge Getzendanner.

"I do want Mr. Tuite to continue representing me in the case."

Now, I recognize that the situation now emerges in Mr. Roth's eyes as a difficult one. Indeed, he may even regard it as an unfair one.

But the matter was ventilated with Judge Getzendanner, and they discussed these incidents, and Mr. Roth then makes this pervasive assertion that -- I know all about all the potential conflicts, and I would waive them all, and I want Mr. Tuite to represent me, he's my guy, and I am going to stay with him.

And in those circumstances, it comes far too late for Mr. Roth to now return and say, Judge Getzendanner was under an obligation to conduct a more complete inquiry than she did with respect to Mr. Tuite's potential conflicts.

Mr. Roth now says that the conflicts have become manifest by Tuite's post-trial unwillingness to represent Mr. Roth in appearances before the grand jury.

But that's part and parcel of Mr. Tuite's telling Mr. Roth, and on the record, that he could not represent him in any cooperation between Roth and the Government because of possible conflicts with his lawyers.

It's obvious that in these proceedings -- and by these proceedings, I mean the totality of this investigation, that one of many techniques which the Government has used and used with some success is to take convicted defendants and take them back to the grand jury -- whether they grant them immunity or not I don't know, because the record against those defendants has now been complete from an immunity standpoint and the conviction has been proved -- and they are taken before the grand jury and they seek additional information from them.

And that's what evidently was going to transpire here, and Mr. Tuite said to Roth, I'm sorry, you know, I can't represent you on that any more.

With respect to the appeal, I -- Mr. Roth asserts that Tuite said, "I can't represent you on the appeal because of a conflict."

I must say to you that I am -- I am perplexed by that, but I do not regard it as a circumstance indicating, again, that a more meaningful inquiry should have been conducted by Judge Getzendanner.

The fact of the matter is that Mr. Roth now has conflict free counsel representing him on appeal, so Mr. Tuite's rejection of the appeal is a matter which I think is a closed item.

Now, finally, we have this episode of the affidavit, the search warrant affidavit with the confidential informant advising the affiant, and the materials that have been submitted to me are so truncated I really don't know the total context in which this was said. But that the affiant alleges that Roth evidently boasted to Wexler that Roth had paid some money to Judge McDonnel,

and Roth says that I didn't know that those things had occurred, I didn't see those papers that were filed with Judge Getzendanner with regard to the motion to suppress, and to exclude the bugging of Judge Olson's chambers.

But now I know that that was -- that that allegation had been made against me, and now I know that Tuite didn't put me on the witness stand to testify in my own behalf because he was afraid that I was going to be cross examined about the alleged payoff to McDonnell, which was false, but Tuite was either representing McDonnell or was a friend of McDonnell's.

Well, all of this is intertwined again with two things. First, Mr. Roth voluntary, knowing, intelligent waiver of his right to testify.

He didn't -- he did not assert to Judge Getzendanner, "I want to take the stand and tell my story." He didn't do that. He said that he didn't want to testify. It was a voluntary decision not to testify on his part.

The second gets back again to what may appear to some to be the regrettable intertwining by Mr. Tuite of all of these persons -- not all of them, but many of the persons that have been accused in this situation.

Mr. Tuite appeared before me in one of the first of the trials, the trial of Judge Laurie, and Judge Laurie was found not guilty.

I knew from just talk around here and there that Mr. Tuite had a number of these clients. I had no idea how many he had until the papers were presented to me here.

But Roth was aware of Tuite's multiple representations. And the subject matter was ventilated, and I get back again to his assertion to Judge Getzendanner that I want Mr. Tuite to

continue representing me in this case. If there were some potential conflicts, I would certainly waive any potential conflicts.

I think Mr. Roth has to live with that, and his motion under Rule 33 for a new trial upon the grounds that he was represented by counsel with a conflict of interest and, therefore, denied the effective representation of counsel under the Sixth Amendment – that that prong of the motion must be denied.

Insofar as the Brady aspect of the motion is concerned, the materials which the Government has submitted abundantly demonstrate that in the final analysis, Judge Olson was prepared to testify in behalf of the Government, that he did recall the transactions with Roth.

There are no materials before me that suggest that there was any memorandum or anything like that that should have been submitted to the defense under Brady.

Query as to whether Mr. Zenner and his colleague in the case were under an obligation to advise Mr. Tuite of the fact that Olson had equivocated or advised Mr. Roth that Olson had equivocated early in their interrogations of Olson.

But I believe that that is a question more appropriately presented to the Court of Appeals on the direct appeal, and if the Court of Appeals is of the view that I should hear it, they can send it back to me either under Rule 33, or they can send it back to me – or send it back to the District Court with instructions that that is an issue that should be presented under Section 2255 of the Judicial Code.

But I am not persuaded that I should at this point say to the Court of Appeals I think this motion has some merit, I'm prepared to go ahead and hear it, remand the case to me so that I can do so.

Quite the contrary, I think that the Brady argument that is advanced here with respect to Judge Olson is without merit and, accordingly, the motion for a new trial – the belated motion for new trial under Rule 33 is denied in its entirety.

That leaves two issues open. One, the motion for bond pending appeal; and second, the motion for the furlough.

As far as the furlough is concerned, in light of the ruling on the motion for new trial, I see no need to interrupt Mr. Roth's sentence unless we grant him bond pending appeal.

Now, as the Government points out in its response to the motion for bond pending appeal, the defendant in no way submits the substantiality of the issues that are going to be raised on appeal.

And I've read all of these papers, and I mean all of them, Mr. VanDercreek, and I – I find no suggestion at all as to what the issues are going to be other than these belated issues which I have ruled upon and which I conclude are without merit.

This Circuit has concluded that a substantial question is a close question, or one that could very well be decided the other way.

Recently, I had an experience this past summer in a case in which – upon reflection – I concluded that a defendant was entitled to bond pending appeal, and I wrote an opinion to that effect. The Government disagreed with it, appealed the order, and the Court of Appeals reversed me in a nonpublished order.

This is the Reginald Holzer case. But certainly – and I don't mean to be second guessing the Court of Appeals, but the substantiality of the errors which emerged in the Holzer case, in light of the Supreme Court's decision in McNally were – I thought – quite substantial.

The Court of Appeals disagreed with me, and has now rendered a decision on the merits. But I don't know what you are going to argue in the Court of Appeals, Mr. VanDercreek.

The post trial motion hasn't been resubmitted to me. As Mr. Zenner points out, no briefs have been submitted. And while in the "old days" bail pending appeal in the case of a person like Mr. Roth, who is not a risk of flight, was granted as a matter of course almost, that is not true under the Bail Reform Act, and that is particularly not true in this Circuit.

The Court of Appeals for this Circuit has mad it abundantly clear to District Judges that if the Government seeks detention pending appeal, that should be the order unless the plaintiff – the defendant carries his burden of proof on flight which the Government concede here that he's not a risk of flight, and on substantiality, which Mr. Roth has not done.

So the motion for bond pending appeal is likewise denied.

I think that takes care of all of the motions.

To recapitulate, the motion for new trial under Rule 33 is denied.

The motion for bond pending appeal is denied.

And the motion for a furlough is likewise denied. That wraps things up, I think.

MR. VANDERCREEK: Thank you, your Honor.

MR. ZENNER: Thank you, Judge.

THE COURT: Okay, fellows.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES

v.

85-CR-763

BRUCE ROTH

_____/

AFFIDAVIT

Bruce Roth being first duly sworn does hereby state and depose as follows:

1) Affiant was the Defendant in U.S. v. Bruce Roth, 85 CR 763.

2) At a status hearing on July 9, 1987 prior to the trial of affiant's case, Judge Getzendanner made affiant aware that Mr. Tuite could not represent affiant, if affiant desired to cooperate with the government.

3) Judge Getzendanner stated that Mr. Tuite was representing other people in the "Greylord" investigation and would have conflicts of interest for cooperation purposes. No disclosure was made or explained that in addition to the conflict on the cooperation issue, the conflict would relate to trial issue affecting the conduct of the case or the merits of the substantive issues.

3) To the best of my recollection and belief, following the discussion on the cooperation issue, the government raised two specific instances of conflict. One involved an attorney Michael Saken who had been represented by Tuite and who was involved in a state perjury charge against affiant where affiant was acquitted. The other involved an attorney Arthur Zimmerman

who was indicted in state court for his involvement in the Michael Davis incident for which affiant was charged in the instant case. Zimmerman was represented by Tuite and was acquitted. Both of these potential conflicts presented no problem to affiant.

4) However, Mr. Tuite's conflicts with regards to the testimony of former Judge Olson were never disclosed to affiant. Had Judge Olson taken the witness stand, damaging tapes which concerned other clients of Mr. Tuite could have been put into evidence, and a proper examination of said witness would, of necessity, broached areas which could have had adverse implications for other clients of Mr. Tuite. While those tapes and examination would have bolstered affiant's various defenses, they created problems for other clients of Mr. Tuite. This was never disclosed to affiant. Affiant was also advised by Mr. Tuite not to testify in part to keep former Judge Olson from the stand after Mr. Tuite represented to affiant that Judge Olson would testify against affiant.

5) After affiant's trial, affiant became aware of the fact that due to Mr. Tuite's representation or other people connected to the "Greylord" investigation, Mr. Tuite was inhibited in his defense of affiant. Mr. Tuite never discussed cooperation and never revealed that calling certain witnesses could create problems for his other clients. In particular, no disclosure was made regarding calling Judge Olson or Judge Stillo, both of whom to the best of affiant's knowledge and belief were prepared to make exculpatory statements on behalf of affiant and potentially damaging statements about other Tuite clients. To the best of affiant's knowledge and belief, neither Olson nor Stillo were specifically contacted or interviewed by Tuite. Both Olson and Stillo were among the racketeering counts with which affiant was charged in this cause.

6) Affiant was not aware of the fact prior to or during his trial that Mr. Tuite was representing him while having these various conflicts.

7) Affiant was aware in a generai way that Mr. Tuite was representing other people in connection with the "Greylord" investigation, but affiant was not aware that this other representation would inhibit Mr. Tuite's ability to properly represent affiant, nor did Mr. Tuite ever discuss this with affiant. Mr. Tuite had extolled affiant to plead guilty without cooperation. He informed affiant of a plea offer that would cap affiant's exposure at four years without cooperation, but did not indicate that other offers might be available. Affiant believes from statements that have been made to him that a lower offer was made but not communicated to him. He also told the affiant not to testify and that if affiant insisted, he would not assist affiant in doing so despite affiant's continual protestations of innocence.

8) Even though affiant had repeatedly advised Mr. Tuite he had not given money to Judge Olson, Mr. Tuite announced during his opening statement that affiant had given money to Judge Olson in order to keep Judge Olson from taking the stand.

9) If Mr. Tuite would have disclosed and/or discussed these conflicts with affiant, other counsel would have been sought.

10) Further, it was discovered by affiant subsequent to his trial that Mr. Tuite himself was under investigation by the Attorney Registration and Disciplinary Commission for making a loan to a "Greylord" judge. and that the Commission was seeking to suspend his license or impose other possible punishment.

11) Had affiant been made aware of this conflict he would have sought other counsel, due to the possible chilling effect this problem would have on Mr. Tuite's representation of your affiant.

12) Subsequent to trial in U.S. v. Bruce Roth, affiant was subpoenaed to testify in front of a federal grand jury in connection with the "Greylord" investigation.

13) The attorney who represented affiant in connection with his testimony in front of a federal grand jury was Edward M. Genson rather than Patrick A. Tuite, as Mr. Tuite explained that he could not represent your affiant due to a conflict of interest. The person who was the subject of the grand jury investigation was a client and close friend of Mr. Tuite.

14) During conversations with Attorney Genson affiant became aware of the fact that former Judge Wayne Olson was debriefed by the federal government concerning "Greylord" matter prior to affiant's trial. Attorney Genson was present during some of these debriefing sessions. Attorney Genson heard former Judge Olson state that he could not remember Bruce Roth giving him money.

15) Attorney Genson even indicated that if former Judge Olson had given testimony contrary to what he indicated at the debriefing session, that Genson could have been used to impeach him.

16) On may 15, 1986 a pretrial motion for disclosure of exculpatory evidence, including impeaching information, was filed on behalf of your affiant. The Government never made known to the defense that Judge Olson could not remember affiant giving him money.

17) In fact, Judge Olson's name was included on the Government's list of witnesses and to the best of affiant's understanding and belief, he was brought in may times from Lexington, Kentucky where he was confined as a potential witness.

18) Former Judge Olson is a cooperating government witness and had named numerous attorneys as having given him money without any defect in memory. Thus, Judge Olson had no reason to protect affiant. Even though the Government attempted to refresh his memory through the use of ambiguous taped

conversations between affiant and Judge Olson, he still could not remember affiant giving him money.

18a) Affiant was further informed by Attorney Nicholas A. DeJohn of another incident involving Judge Olson. DeJohn represented one Bruce Wexler, an attorney who has since been charged with various offenses as part of the Greylord investigation. DeJohn related to affiant that as part of a debriefing conference with the government, a tape was played which indicated that Wexler was potentially involved in a bribe with another Tuite client. This information was never related to affiant by Tuite at any time nor was the impact of this tape on Tuite's other clients or affiant's defense ever explained to affiant. To the best of affiant's knowledge and belief, Tuite now represents Wexler.

19) At no time during Tuite's representation of affiant did he specifically or in a general way identify his other Greylord clients or explain to me the possible conflicts which his simultaneous representation might cause between those clients and myself. No such explanation was made to me by the COurt, other than as previously explained in this affidavit.

20) Your affiant assumed that all conflicts of interest had been disclosed to him because no other such matter were raised by Judge Getzendanner during the course of the proceedings.

21) Following trial, affiant was approached by attorney Edward Genson who indicated that he would represent affiant on appeal. Affiant contacted Brent Stratton, an associate of the Tuite firm, and discussed the matter with him. Stratton told affiant that Tuite would not be able to represent affiant on appeal because of all of the conflicts between the Tuite firm and affiant.

Date this 29th day of
January, 1988.

/s/ Bruce Roth
Bruce Roth

The abovesigned appeared, swore and subscribed to this document before me at _____ this 19 day of January, 1988.

/s/_____
Notary Public

My Commission Expires: 8-89

No. 88-1383

Supreme Court, U.S.
FILED
APR 28 1989
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1988

BRUCE ROTH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner made a knowing and intelligent waiver of his right to a lawyer free of potential conflicts of interest.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-16) is reported at 860 F.2d 1382.

JURISDICTION

The judgment of the court of appeals was entered on October 26, 1988. A petition for rehearing was denied on December 6, 1988. Pet. App. 17-19. The petition for a writ of certiorari was filed on February 9, 1989, and is therefore out of time under Rule 20.1 of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Illinois, petitioner was con-

victed of participating in the affairs of an enterprise through a pattern of racketeering activity, in violation of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1962(c), and conspiring to commit that offense, in violation of 18 U.S.C. 1962(d). He was also convicted on two counts of interfering with interstate commerce by threats and violence, in violation of 18 U.S.C. 1951. He was sentenced to 10 years' imprisonment.

1. The evidence at trial, the sufficiency of which is not in dispute, showed that petitioner—a former state prosecutor and a member of the bar for more than 20 years—routinely bribed various Chicago city court judges. In Illinois, criminal defendants post with the court 10% of any appearance bond. If the defendant appears for trial, that money is refunded, minus a fee. The court, however, can direct that the refund be paid to the defendant's lawyer to cover legal fees. Petitioner had an arrangement with Judge Wayne Olson in which petitioner kicked back a portion of any cash bond refund that was assigned to him by the judge. In addition, petitioner paid bribes to Judge Olson in order to influence the outcome of cases. Pet. App. 2-4.

Petitioner also served as a broker between Judge Alan Lane and criminal defense lawyers who were willing to pay bribes for favorable rulings for their clients. In one case, Rocco Filliponio was acquitted by the judge on serious drug and weapons charges in exchange for $15,000. Petitioner was paid an additional $10,000 for setting up the deal. In another case, petitioner approached Michael Davis following Davis's conviction and promised him that he would prevail in his post-trial motions if he paid $10,000, to be split equally between Judge Lane and petitioner. On another occasion, petitioner helped a defendant to bribe another judge in order to obtain a favorable post-trial ruling. Pet. App. 4-6.

Petitioner was arrested by federal law enforcement agents during the "Greylord" investigation into corruption in the Chicago criminal justice system. He retained Patrick Tuite, one of Chicago's leading criminal defense lawyers, to represent him at trial. Tuite had represented several judges and lawyers in connection with charges of corruption and had engineered the only total acquittal that had been obtained in any Greylord prosecution. Tuite informed petitioner that he could not represent petitioner in connection with a plea bargain, but that he would represent him if petitioner pleaded not guilty and went to trial. Petitioner agreed to that condition and retained Tuite. Pet. App. 6.

The district court conducted a hearing to determine whether petitioner understood and wished to waive potential conflicts of interest created by Tuite's representation of other Greylord defendants. Pet. App. 23-29. At the hearing, the prosecutor expressed concern that in state court Tuite had represented co-defendants of both Filliponio and Davis, who were to testify for the government. Tuite told the court that his prior representation would not prevent him from conducting a thorough cross-examination of Filliponio and Davis. Pet. App. 6-7, 26-27.

Petitioner informed the court that he had "fully discussed everything with Mr. Tuite at some length," that he was "well aware of all of the potential conflicts," that he did "not believe there are any conflicts," and that he would "waive any potential conflicts." Pet. App. 27. Petitioner added that he wanted Tuite "to continue to represent me in the case." *Ibid.* The court asked Tuite about the effect of his representation of other Greylord defendants and suspects. Tuite said: "I'm not exactly sure all of the things that would come up. But I represent so many people in these investigations, there's always potential conflict." Pet. App. 28. Petitioner stated that he understood his

right of conflict-free representation and again stood on his choice of attorney. The court then asked petitioner whether he understood that Tuite could not represent petitioner if he decided to negotiate a plea with the government. Petitioner stated that he was "fully aware of that." Pet. App. 29.

2. Following his conviction, petitioner moved for a new trial based on Tuite's alleged conflict of interest. Petitioner claimed that Tuite had every reason to be cautious in representing him because Tuite was under investigation by the state attorney disciplinary commission for having loaned money to a Greylord judge in 1982. He also claimed that after petitioner's conviction, Tuite ceased to represent him on appeal or at an appearance before a federal grand jury because of the conflict. Petitioner further claimed that he was prejudiced because Tuite did not call him to testify in his own behalf. Tuite took that position, petitioner claimed, because Tuite wanted either to avoid incurring the prosecutor's enmity or to avoid eliciting from petitioner evidence that could damage Tuite's other clients. Pet. App. 44-48.

Petitioner's motion was assigned to a different judge, because the judge who presided over petitioner's trial had resigned in the interim. The district court denied the motion without a hearing. The court noted that Tuite's difficulties with the disciplinary committee did not constitute grounds from which to infer a conflict of interest. The court also rejected petitioner's claim that the conflict caused Tuite not to call petitioner as a witness. The court concluded that petitioner made a knowing, intelligent, and voluntary waiver of his right not to testify following an inquiry by the trial judge. Pet. App. 35.

The court of appeals affirmed (Pet. App. 1-6), holding that petitioner validly waived his right to conflict-free counsel. The court stated that a waiver is sufficient if the defendant knows enough about the risks of conflicts of in-

terest to make his choice an informed one. The court of appeals noted that a trial court should inform a defendant of the nature and the importance of the right to conflict-free counsel and ensure that the defendant understands that right and something of the consequences of a conflict. It stated that a valid waiver would result if the "defendant knows the types of risks at stake and acts 'with open eyes.' " Pet. App. 12.

In upholding petitioner's waiver, the court noted that petitioner had been a lawyer for more than 20 years and knew what conflicts of interest are and their consequences; that petitioner had hired Tuite precisely because of Tuite's experience in defending Greylord defendants; and that Tuite had stated in court that he would not do anything to jeopardize his other clients. Under these circumstances, the court concluded, petitioner's waiver was both knowing and voluntary. Pet. App. 13.

The court of appeals further concluded that, even if petitioner's waiver did not encompass undisclosed, potential conflicts, petitioner had failed to establish, by specific instances in the record, that Tuite was burdened with an actual conflict of interest that adversely affected his ability to defend petitioner zealously. "Even if [petitioner's] decision not to testify was based on Tuite's advice, which is unlikely," the court noted, "there is no evidence beyond [petitioner's] conjecture that the advice was the product of an actual conflict rather than the product of a prudent defense strategy." Pet. App. 14.

ARGUMENT

Petitioner contends (Pet. 4-9) that he did not execute a valid waiver of conflict-free counsel because the district court did not conduct a thorough inquiry into his attorney's possible conflicts of interest. The court of ap-

peals correctly rejected this fact-bound claim, and its decision does not conflict with the decisions of this Court or any other court of appeals.

1. The Sixth Amendment right to counsel includes the right to an attorney who is not laboring under a conflict of interest. See *Cuyler* v. *Sullivan*, 446 U.S. 335 (1980). A defendant, however, may waive that right. See *Holloway* v. *Arkansas*, 435 U.S. 475, 483 n.5 (1978). See generally *Wheat* v. *United States*, 108 S.Ct. 1692, 1696-1700 (1988). When a defendant wishes to waive his right to conflict-free counsel, the trial court should conduct a hearing to determine that the defendant's waiver is knowing and intelligent. But the trial court is not required to follow any predetermined script in conducting the hearing, nor is the court required to ascertain that the defendant is aware of every piece of information that could possibly bear on the issue. "[A] defendant need not be aware of every detail of a conflict of interest to be able effectively to waive the right." *In re Paradyne Corp.*, 803 F.2d 604, 611 (11th Cir. 1986). See also *Moran* v. *Burbine*, 475 U.S. 412, 422 (1986) (waiver of the right to counsel does not depend on knowledge of every factor that could conceivably influence decision). Rather, it is sufficient that the defendant "understands the details of his attorney's possible conflict of interest and the potential perils of such a conflict." *United States* v. *Garcia*, 517 F.2d 272, 278 (5th Cir. 1975).

Petitioner's waiver was plainly valid. During the conflict hearing, petitioner specifically informed the district court that he had "fully discussed everything" with Tuite, that he was "well aware of all of the potential conflicts," and that he nevertheless desired to retain Tuite as his attorney. The district court had ample reason to credit petitioner's response. As an attorney who had practiced criminal law for 20 years, petitioner undoubtedly understood his Sixth Amendment right to counsel and the consequences of pro-

ceeding with an attorney burdened with a conflict of interest. Moreover, petitioner clearly knew many of the details of his attorney's potential conflicts since his selection of his attorney was expressly based on the attorney's previous experience in representing Greylord defendants. And the court specifically addressed two prior state cases in which Tuite had been involved, which the prosecutor suggested might give rise to a conflict. Pet. App. 24-25. Tuite and petitioner both expressed their awareness of those incidents. Tuite described them in detail and explained why he did not believe they would create a conflict of interest and, upon inquiry by the court, petitioner agreed. *Id.* at 26-27. In sum, given petitioner's experience and his unequivocal assurances that he understood his rights but wished to retain Tuite, the court of appeals properly held that petitioner knowingly and intelligently waived his right to conflict-free counsel.

2. Contrary to petitioner's contention (Pet. 7-9), the decision below does not conflict with *Wheat* v. *United States, supra.* In *Wheat*, this Court held that a district court has considerable discretion to refuse to accept a defendant's waiver of conflict-free counsel in the interest of justice. That case did not involve the validity of the waiver, but involved the quite different question whether a district court is required to accept a waiver if the defendant offers it. Thus, even if the district court, under *Wheat*, could have refused to accept petitioner's waiver, that does not by any means indicate that the court's decision to accept the waiver was error.

Nor does the decision below conflict with any court of appeals' decision. In *United States* v. *Garcia, supra,* the Fifth Circuit stated that a trial court must conduct a "thorough consultation" with the defendant before accepting the defendant's waiver of conflict-free counsel, but it did not require the court to conduct a prescripted inquiry

divorced from the facts of the case, nor did it require the court to examine the defendant concerning every possible fact that could bear on the issue of waiver. See *In re Paradyne Corp.*, 803 F.2d at 611 n.18. As the Fifth and Eleventh Circuits require, the district judge in this case addressed petitioner personally, forthrightly advised him of the potential for a conflict of interest, and elicited a "narrative response" from petitioner that he had been advised of his right to effective representation and that he understood the potential conflicts. *Garcia*, 517 F.2d at 278; *In re Paradyne Corp.*, 803 F.2d at 608.

In *United States* v. *Petz*, 764 F.2d 1390 (11th Cir. 1985), upon which petitioner also relies (Pet. 6), the court of appeals declined to resolve the issue whether the defendant had waived his right to conflict-free counsel. The court held merely that the defendant could raise the matter in a collateral proceeding. None of the other cases cited by petitioner (Pet. 5-6) involved the issue of the sufficiency of the district court's inquiry of the defendant before accepting a waiver of conflict-free counsel.*

3. Petitioner does not challenge the court of appeals' conclusion (Pet. App. 13) that petitioner failed to demonstrate that his attorney had an actual conflict of interest

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* In *United States* v. *Flanagan*, 679 F.2d 1072 (3d Cir. 1982), rev'd on other grounds, 465 U.S. 259 (1984), and *United States* v. *Dolan*, 570 F.2d 1177 (3d Cir. 1978), the court of appeals upheld the district court's disqualification of an attorney on the ground that the attorney had a conflict of interest. In *United States* v. *Dressel*, 742 F.2d 1256 (10th Cir. 1984), the court of appeals held that the defendant was not denied the effective assistance of counsel where the attorney had represented a co-defendant and had previously represented a government witness. Finally, in *United States* v. *Diozzi*, 807 F.2d 10 (1st Cir. 1986), the court of appeals held only that the trial court erred in disqualifying the defendant's attorney on the ground of conflict of interest.

that adversely affected his representation of petitioner. Thus, even assuming that petitioner's waiver was not sufficient to encompass undisclosed, potential conflicts, petitioner has failed to establish any basis for disturbing his conviction. See *Burger* v. *Kemp*, 107 S.Ct. 3114, 3121 (1987).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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CASE NO. 88-1383

in the
Supreme Court
of the
United States of America

October Term, 1988

BRUCE ROTH,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Seventh Circuit

REPLY BRIEF IN SUPPORT OF PETITION

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REPLY BRIEF IN SUPPORT OF PETITION

Jurisdiction

This is a criminal case that was docketed by the Clerk's Office within the permissive limits of Supreme Court Rule 20.1. Jurisdiction exists under 28 U.S.C. § 1254(1).

Argument

Petitioner and the government agree that a district judge must conduct a hearing once a conflict between an attorney and his client becomes evident. Govt. Br. at 6. The parties disagree whether an acknowledged conflict which prevented Petitioner's trial attorney from representing him for plea bargain requires the district court to balance the relevant interests as was done in *Wheat v. United States*, 108 S.Ct. 1692 (1988).

The *Wheat* case holds that a district judge has the discretion to reject a knowing and intelligent waiver of a conflict even if that rejection results in denying a criminal defendant his counsel of choice. An inescapable corollary of this holding is that it would be an abuse of discretion to accept a waiver in a case of obvious or outrageous conflict. A further implication of the *Wheat* decision is that a district judge must conduct an inquiry of sufficient depth to assure that the judge has enough information to properly exercise the discretion approved in *Wheat*.

Plea bargaining, the offering to cooperate with the government in the hopes of receiving a lesser sentence, is an integral aspect of the criminal justice system. Perhaps it should be non-waivable, but it certainly should not be waived unless the trial court expressly balances the relevant interests as was done in *Wheat*. In the case at bar, acceptance of Petitioner's waiver without balancing the interests was an abuse of discretion. The government's Brief in Opposition does not address Petitioner's claims, stating only that refusal to accept the waiver "does not by any means indicate that the court's decision . . . was error." Govt. Br. at 7.

The impact of the acknowledged conflict on plea bargaining was manifest in this case. The government claimed throughout the proceedings below that Petitioner was obviously guilty. This position was clearly adopted by the appellate court. Pet. App. 1-6. Accepting the government's claim and the appellate court's conclusion at face value, it is apparent that Petitioner needed the close assistance of counsel regarding a possible plea. While the plea required the

admission of guilt, it also represented an opportunity for Petitioner to minimize punishment, possibly cooperate with the government, and show rehabilitation. Even though Petitioner was a trained criminal lawyer, he could not conduct plea negotiations with the government on his own; he was dependent upon his attorney to negotiate with the government and to inform the Petitioner of his options. Yet, it was exactly in this area that trial counsel admitted conflict and refused representation. Pet. App. 28.

Of further significance is the admission of trial counsel to other potential yet real conflicts which were not explained and about which the Court did not require any elaboration. Pet. App. 28. The Court had no way of knowing whether Petitioner was aware of these admitted conflicts because no inquiry was conducted. As the Fifth Circuit observed in *United States v. Garcia*, 517 F.2d 272, 278 (5th Cir. 1975), a defendant must at least "understand the details of his attorney's possible conflict of interest and the potential peril of such a conflict." Govt. Br. at 6. This standard was not met. The District Court's failure to inquire further despite trial counsel's admissions was error which requires reversal; the Seventh Circuit's failure to recognize the scope of *Wheat* justifies a decision to grant certiorari to clarify this important segment of the conflict rules.

The position of the Seventh Circuit (Pet. App. at 12-13) and the Solicitor General (Govt. Br. at 6) is that if a defendant is a lawyer, no balancing of rights or interests is needed. To the contrary, a lawyer often

needs advice about his personal legal affairs more than a layman. Certainly in this case, had Petitioner received conflict free advice, he might well have struck a deal with the government. At the very least, Petitioner would have changed trial counsel had he then known about the conflicts that he discovered later. Pet. App. at 44-47.

Finally, the government claims that there is no conflict among the Circuits sufficient to justify the attention of this Court. A careful reading of the cases cited by Petitioner indicates the contrary. It is essential that the scope question be resolved and that the practice of the district courts regarding conflict hearings be made uniform. Virtually every criminal case presents an issue of whether to plea bargain. the conflicts and problems are of substantial public importance.

Conclusion

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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